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No. 83-1242

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SUN MYUNG MOON and TAKERU KAMIYAMA,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF AMICI CURIAE FOR BISHOP ERNEST L. UNTERKOEFLER CLARE BOOTHE LUCE EUGENE J. McCARTHY ROBERT DESTRO AND A COALITION OF CATHOLIC LAYMEN

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Pursuant to Rule 36.1 of the Rules of this Court, the individual *amici* listed below file this brief in support of the petition for certiorari. Consent for filing this brief has been obtained in writing from the attorneys of record for the parties in this case. Their original letters are filed together with this brief.

INTEREST OF AMICI

Bishop Ernest L. Unterkoefler, Clare Boothe Luce, Eugene J. McCarthy, Robert Destro, Hurd Baruch, Joseph McPherson, Ralph McInerny, Paul Finney, Edward S. Szukelewicz, Joseph McGrath, Joseph Crumlish, and Edward Canfield are members of the Roman Catholic Church. The *amici* by profession and calling include a member of the hierarchy of the

Roman Catholic Church, a former United States Ambassador, a former United States Senator, business executives, a publisher, lawyers, teachers, former members of the Executive Branch, veterans of the armed forces, married and single, male and female Catholics.

Amici are appalled by the treatment afforded Reverend Moon in this case because, as the Second Circuit majority acknowledged, Reverend Moon "is the spiritual leader of the [Unification] Church, as the Pope is the spiritual leader of the Roman Catholic Church." *United States* v. *Moon*, 718 F.2d 1210, 1227 (2d Cir. 1983). Moreover, the manner in which property is held in the Unification Church—an issue of critical significance in Reverend Moon's case—is similar in many respects to the manner in which property is held in the Roman Catholic Church. Finally, the intolerance and persecution encountered by the Unification Church in this country is all too reminiscent of the experience of Catholics in 19th century America, the bitter traces of which linger to this day. Because the above-named *amici* believe Reverend Moon to have been dealt a serious injustice by the courts below, and because of the parallels between the practices and precepts of his church that were condemned in this case and the practices and precepts of theirs, *amici* share a particularly keen interest in this Court's review of the judgment below.

Although *amici* do not claim to represent the views of all Catholic laymen, they believe that their views would fairly represent a sizeable segment of the Catholic lay community. Catholic lay persons number in the millions and are under an obligation in conscience to express their position on issues which could seriously affect the practice of their religion.

While there are many significant differences between Unification theology and the tenets of the Roman Catholic Church, the similarities—centering around the trust placed by the members in the head of the Church—are at the heart of this case and are of vital interest to the *amici*. Consequently, *amici* believe that the legal issues in this matter deserve an expression of their concern.

STATEMENT OF THE CASE

Amici adopt the statement of the case set forth in the petition for certiorari, insofar as the facts set forth therein are relevant to the arguments below.

SUMMARY OF THE ARGUMENT

The First Amendment to the Constitution prohibits "excessive government entanglement with religion." *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971). The far-reaching decision of the court below invites this type of entanglement in several respects. Specifically, the court approved of certain jury instructions utilized in the trial court which permitted the jury to determine whether the funds at issue in this case were used for religious purposes without reference to the doctrine of the Unification Church as to what its religious purposes embraced. Further, the court refused to recognize the crucial significance of the ecclesiastical role of Reverend Moon within the Unification Church in its determination of the ownership of such funds.

In this connection, *amici* call the Court's attention to the description of the Unification Church and its theology offered by the New York Court of Appeals in *Holy Spirit Association* v. *Tax Commission*, 55 N.Y.2d 512, 524-25, 450 N.Y.S.2d 292, 296-97, 435 N.E.2d 662, 666-67 (1982):

> According to Unification theology, the 'great promise of Christianity' is 'the return of Christ' . . . Through the Resurrection, the Church believes, Jesus brought 'spiritual salvation,' but the physical institutions of this world—beginning with the family—remained unredeemed; in the Church's view, it is for the new Messiah to restore a Bride and establish the True Family serving as the foundation for ending 'the existence of evil in the world,' and to accomplish 'not only spiritual but also physical' salvation for mankind. Adherents of the Unification faith look to Reverend Moon to accomplish this task.

Amici submit that had the court properly considered these doctrines of Unification theology, including the special role of Reverend Moon within this theology, and the special status of

religion under the Constitution, the court could not have found Reverend Moon to be the beneficial owner of the funds at issue herein.

Amici concur with the Petitioners that the donative intent of the various contributors of the funds in question is of overriding significance in determining the ownership of those funds. Nevertheless, *amici* do not believe that interest income on funds contributed into the hands of a church leader, by church members for church purposes, can be treated as income to the church's leader unless those funds have been improperly diverted and used *primarily* for the personal benefit of that leader, rather than for purposes which are consistent with the stated objectives of the church.

For these and other reasons discussed below, *amici* believe that Reverend Moon's petition for certiorari should be granted by this Court.

I. THE DECISION OF THE SECOND CIRCUIT INVITES AN UNCONSTITUTIONAL ENTANGLEMENT OF CHURCH AND STATE

The distinction between church and state in America did not suddenly emerge in the 18th century.[1] Rather, it had its genesis in the concept of the freedom of the church enunciated by church fathers after the fall of the Roman Empire.[2] The concept of two orders, each supreme within its own jurisdiction, persists to this day.

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[1] *See* L. Pfeffer, *Religious Freedom* 3 (1977).

> "The dual principle of the First Amendment—that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof—was not invented in 1791 when the amendment was added to the newly established United States Constitution. For Centuries before then philosophers, religious leaders, and statesmen had asserted that men should be free of governmental coercion in their beliefs and in the expression of their beliefs in matters of religion."

[2] *See* J. C. Murray, *We Hold These Truths* 196 (1964).

> "Two there are, august Emperor, by which this world is ruled on title of original and sovereign right—the consecrated authority of the priesthood and the royal power. [Pope] Gelasius I to Emperor Anastasias I, 404 A.D.

By trial and error a compromise and equilibrium has been attained in the United States between the freedom to worship and the power of the state. Certain relationships are the concern of both the religious and secular orders, although for different purposes. But control over the religious order, through an unwarranted extension of power granted by the people to the secular order, would be a constitutional disaster. The solution our founding fathers developed to avoid possible conflicts between the body politic and the various forms of religious belief is found in the First Amendment to the Constitution which provides that "Congress shall make no law respecting an establishment of religion . . ."[1]

The current test for determining whether state actions are consistent with the Establishment Clause was set forth in *Lemon* v. *Kurtzman*, *supra* wherein the court stated:

> The law in question must, first, reflect a clearly secular legislative purpose, second have a primary effect that neither advances nor inhibits religion, and, third avoid excessive government entanglement with religion."

For the reasons stated below, *amici* believe that the decision of the Second Circuit invites an excessive entanglement of church and state.

A. The Second Circuit Improperly Refused To Recognize Reverend Moon's Ecclesiastical Role Within His Religion, A Crucial Factor In The Determination Of His Guilt Or Innocence.

In urging the Internal Revenue Service to undertake an investigation of Reverend Moon and the Unification Church—a request that ultimately led to the prosecution of Reverend Moon in this case—Senator Robert Dole, a member of the Senate Finance Committee, stressed the identification of Reverend Moon and the Unification Church. "Since many members of the [Church] perceive Mr. Moon to be the embodiment

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[1] U.S. Const. Amend. I.

of the Church," Senator Dole wrote, "the appearance is that his stated intentions are not simply the goals of a private individual but the stated purposes of the [Church]."[4]

Nevertheless, in upholding Reverend Moon's conviction, the Second Circuit concluded that Reverend Moon's ecclesiastical status was *beside the point* in considering his individual responsibilities as a taxpayer. *See United States* v. *Moon*, *supra*. Thus, although it recognized that Reverend Moon "is the head of the [Unification] Church" and the "leader of the Unification Church movement," *Id.* at 1227, the court below, over Judge Oakes's dissent, *Id.* at 1245, sustained the trial court's failure to direct the jury's specific attention to Reverend Moon's role as leader and founder of his Church, *Id.* at 1227. Such instructions, had they been given, would surely have made a difference to the jury in deciding whether Reverend Moon had been given the disputed funds to hold in trust for his followers, thus personally owing no taxes on the interest on those funds. For example, the Second Circuit recognized that the jury based its verdict, at least in part, on evidence that "high ranking members of the Church were told that the Chase funds belonged to 'Father.' " *Id.* at 1220. However, the references to Reverend Moon as "Father" are not unlike references to the Pope as "Holy Father."[5] If only the jury's attention had been focused by the trial judge on the deeply religious significance of such

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[4] Senator Dole's letter to the IRS, noted by the Second Circuit, *see* 718 F.2d at 1229, is reproduced as Appendix A to this brief; it appears in the record below at A1816.

Citations herein to the pleadings will be denoted "A__"; references to the trial transcript will be denoted "T__".

[5] The title "Pope" itself derives from the classical Greek word "pappas" or father, and denotes "spiritual paternity." 11 *New Catholic Encyclopedia* 572 (1967). It should be noted that Reverend Moon certainly occupies no more exalted a place within the Unification Church than the place occupied by the Pope in the Roman Catholic Church; the Pope is regarded as having "supreme and universal power over the whole Church, a power which he can always exercise unhindered." Vatican Council II, *Dogmatic Constitution on the Holy Roman Catholic Church, Lumen Gentium*, 21 November 1964, *reprinted in* Vatican Council II, *The Conciliar and Post Conciliar Documents* 372 (Flannery ed. 1975). The Dogmatic Constitution provides that

references, far from supporting the view that Reverend Moon held the Chase Manhattan Bank funds as his *own*, this terminology, would have supported his claim that he held the funds beneficially for his *followers*. The poet's query, "What's in a name?" could scarcely have greater meaning than in a case such as this.

If permitted to stand, the principle upheld by the Second Circuit could readily be applied against those who hold office in the Roman Catholic Church, as well as against leaders of other hierarchical religions. The weapon fashioned by the government in this case—hailing a religious leader into court in part *because* of his ecclesiastical office,[6] and then denying the significance of that office when it sheds critical, exonerating light on actions taken by the religious leader and his followers, is a weapon that this Court, faithful to the precepts of the Religion Clauses, must not permit civil authorities to wield.

B. The Practice For Which Reverend Moon Was Condemned—Taking And Holding In His Own Name Property Given To Him For Church Purposes—Is A Long-Established Practice Of The Roman Catholic Church And Of Other Religions In America

Since the Edict of Constantine, civil authorities have recognized the validity of bequests to the Catholic Church;[7] and,

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"the Roman Pontiff does not utter a pronouncement as a private person, but rather does he expound and defend the teaching of the Catholic faith as the supreme teacher of the universal Church, in whom the Church's charism of infallibility is present in a singular way." *Id.* at 380.

[6] The trial judge expressly acknowledged that the investigation of Reverend Moon's taxes would have been less likely if his religion had been less "controversial," A536-37; and the Second Circuit, noting that the trial judge had so acknowledged, nonetheless accepted the trial court's incredible conclusion that the government's decision to prosecute Reverend Moon was a "separate" decision. 718 F.2d at 1229.

[7] Edict *reprinted in* P. Coleman-Norton, *Roman State and Christian Church* 85-86 (1966). The power of the Roman Catholic Church in America to hold property was expressly recognized by the Attorney General of the United States in 1822. 1 Op. Att'y. Gen. 563-64 (1822). *See also Municipality of Ponce* v. *Roman Catholic Apostolic Church*, 210 U.S. 269, 318 (1908).

throughout this Nation's history, the Catholic Church and other religious bodies have held property through individual spiritual leaders, constituted as "corporations sole."[8] The corporation sole is a form of property ownership tracing its origin to colonial times; judicial decisions recognizing it appeared as early as 1807.[9] As Justice Story recounted in *Terrett* v. *Taylor*, "the minister of the parish was, during his incumbency, seized of the freehold of its inheritable property, as emphatically *persona ecclesiae*, and capable, as a sole corporation, of transmitting that inheritance to his successors." 13 U.S. (9 Cranch) 43, 46 (1815).[10]

Ironically, the Roman Catholic Church in America at first encountered sharp resistance to its use of corporations sole as a form of property ownership—for reasons strikingly similar to those which caused the trial judge to casually dismiss the notion in this case that Reverend Moon could be "a walking unincorporated association." T6119. The reason was that the Catholic Church "had a hierarchical structure that many found offensive."[11] To many 19th century Americans, the hierarchical character of the Roman Catholic Church "meant government by a foreign sovereign."[12] Thus, for many years the church, although favoring the use of the corporation sole, "was generally unsuccessful in its efforts to have the corporation sole adopted."[13] Indeed, "legislation tended to discriminate against

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[8] *See* Kauper & Ellis, *Religious Corporations and the Law*, 71 Mich. L. Rev. 1499 (1973); P. Dignan, *A History of the Legal Incorporation of Catholic Church Property in the United States (1784-1932)* (1935).

[9] *See e.g., Inhabitants of the First Parish* v. *Dunning*, 7 Mass. 445, 447 (1811); *Weston* v. *Hunt*, 2 Mass. 500 (1807).

[10] *See also Town of Pawlet* v. *Clark*, 13 U.S. (9 Cranch) 292 (1815).

[11] Kauper & Ellis, *supra*, at 1520.

[12] *Id., citing Dignan, supra*, at 192-95. The assets, real and personal, which pertain to the Holy See, dioceses, religious orders, and parishes in America are ecclesiastical property and "are indirectly and directly subject to the authority of the Holy See." A. Maida, *Ownership, Control and Sponsorship of Catholic Institutions* 18 (1975).

[13] Kauper & Ellis, *supra*, 1523-24.

the Catholic Church, since it was feared that, with its hierarchical control, it would accumulate wealth and power incompatible with the American idea of democracy."[14]

As prejudice has been overcome, several states today specifically allow the incorporation of bishops of the Catholic Church as corporations sole,[15] and ownership of church property through the corporation sole is provided by statute in at least 15 states.[16] As Kauper & Ellis note, the corporation sole "is

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[14] *Id.* at 1536.

[15] *E.g.*, Ala. Code § 10-4-1 (1980); Cal. Corp. Code § 10002 (West 1977); Mich. Stat. Ann. 21.1691-2 (1983). For a clergyman or minister to hold title to church property for religious purposes, the New York Court of Appeals long ago held that "there [need be] no declaration of trust," *Baxter* v. *McDonnell*, 155 N.Y. 83, 49 N.E. 667, 668 (1898); *see also* N.Y. Relig. Corp. Law § 91, note 1 (McKinney 1952), and § 436 of N.Y.R.P.T.L. (McKinney Supp. 1983-1984) which specifically provides that "[r]eal property held in trust by a clergyman or minister of a religious denomination for the benefit of the members of his incorporated church or unincorporated church shall be entitled to the same exemption from taxation, special ad valorem levies and special assessments" as real property owned by a religious corporation or association under N.Y.R.P.T.L. § 420-a (McKinney Supp. 1983-1984). *See Town of Hardenburgh* v. *State*, 52 N.Y.2d 536, 540, 439 N.Y.S.2d 303, 304, 421 N.E.2d 795, 796, *appeal dismissed*, 454 U.S. 958 (1981); *In re Kimberly*, 27 A.D. 470, 50 N.Y.S. 586, 590 (N.Y. App. Div. 1898); *In re Smith*, 77 Mun. 134, 28 N.Y.S. 476, 477 (N.Y. App. Div. 1894); *Wolek* v. *New York*, 131 Misc. 37, 225 N.Y.S. 669, 671-72 (N.Y. Mun. Ct. 1927).

[16] Ala. Code §§ 10-4-1 to 9 (1980); Alaska Stat. §§ 10.40.010-.150 (1968 & 1983 Supp.); Ariz. Rev. Stat. Ann. §§ 10-421 to 10-427 (1977); Cal. Corp. Code §§ 10000-15 (West 1977 & 1983 Supp.); D.C. Code Ann. §§ 29.501 *et seq.* (1981 & 1983 Supp.); Hawaii Rev. Stat. §§ 419-1 to 9 (1968); Mich. Stat. Ann. §§ 21.1691-.2016 (1983); Mont. Rev. Codes Ann. §§ 35-3-101 to 209 (1982); Nev. Rev. Stat. §§ 84.010-.080 (1979); N.H. Rev. Stat. Ann. § 306.4 (1966) (not clear that such a corporation could be formed in New Hampshire, but nothing says otherwise); N.C. Gen. Stat. § 61-5 (1982); Ore. Rev. Stat. § 61.055 (1969); Utah Code Ann. §§ 16-7-1 to 11 (1953); Wash. Rev. Code §§ 24.12.010-040 (1969); Wyo. Stat. Ann. §§ 17-80109 to 117 (1977).

exactly what it name implies—a one man corporation," a form of property ownership that "follows from the very nature of" hierarchical religious institutions.[17]

Thus, in holding in his own name, and under his control, property given for religious purposes, Reverend Moon followed a practice as old as the Republic. This practice would have been followed by the Roman Catholic Church even more widely, but for the very type of religious bigotry reflected in the government's failure in this case to respect the method chosen by members of the Unification movement for assuring the proper use of their property. The Second Circuit's notion that Reverend Moon's ecclesiastical office was essentially irrelevant in determining the status of property held by him in his own name and under his control rejects the witness of history. The judgment below can only be regarded as a denial of the legitimacy of his religion—an impermissible basis for assessing criminal liability under the Religion Clauses.

C. The Second Circuit Disrupted The Traditional Equilibrium Between Church And State By Refusing To Recognize The Unification Church's Definition Of Its Religious Purposes.

The distinction between church and state in purposes, methods, and manner of organization has been one of Christianity's cardinal contributions to Western political tradition.[18] When recognition of this distinction has been denied, the result

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[17] Kauper & Ellis, *supra*, at 1540. *See also* A. Maida, *supra*, at 22. *See Bolshanin* v. *Zlobin*, 76 F.Supp. 281, 288 (D. Alaska 1948) ("Conveyance of the legal title [to property] to the spiritual head of [a] church is a fairly common practice.").

[18] R. W. Carlyle, I *A History of Medieval Political Theory in the West* 193 (1928).

> In the fathers, then, we see clearly the first development of those difficult questions concerning the relations of the temporal and spiritual authorities in society, round which so much of medieval political theory was to take shape. There can, we think, be little doubt that in the end nothing contributed so much to emancipate the judgment of theologians from the tendency to recognize an absolute authority in the monarch, as the clearly felt necessity of defending the independence of the Church.

has been an infringement of man's freedom of religious faith, or his freedom as a citizen, or both. The broad American drive toward freedom has naturally included the traditional distinction between church and state which was already embedded in our legal heritage from English common law.

Under our Constitution, property dedicated to religious use can be enjoyed and used by the religion to which it is dedicated and can be converted to any lawful use which the religion desires. No individual or entity, particularly the state, has the right to convert such property to any other use. If the power to tax is the power to destroy, intrusion by the state, through its authority to tax religious entities, arms the state with the ultimate weapon to dominate religion.

The church-state equilibrium established by centuries of political consensus could easily be damaged or destroyed if the corporeal activities of religious institutions and clerics may be scrutinized from a purely secular viewpoint in an attempt to apply a multitude of administrative rules and procedures, some of which cannot be explained even by those charged with that responsibility.[19] In the instant case, however, the trial court had no qualms with ratifying the government's purely subjective analysis of the Unification Church's activities to determine whether those activities were acceptable church activities according to the government's standards. By refusing to instruct the jury that it was required to accept the Unification Church's definition of what is sincerely considered to be its religious purposes, the jury was allowed to reach its own conclusions without any stated guidelines from the court in this regard.[20] In agreeing with the trial court that this

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[19] *See, e.g.*, I.R.C. § 501 (c)(3). S. S. Weithorn, "Frontier Issues of Tax Exemption for Religious Organizations," *Government Intervention in Religious Affairs*, 64-65 (D. M. Kelley, ed. 1982).

[20] Although, under the principles of *United States* v. *Ballard*, 322 U.S. 78 (1944), the state need not respect religious "beliefs" which are fraudulently or insincerely proclaimed, no such claim was made in this case. Indeed, numerous appellate decisions have explicitly or implicitly recognized the sincerity and *bona fides* of the Unification Church as a religion. *See, e.g.*, *Holy Spirit Association [Unification Church]* v. *Tax Commission*, *supra*; *Unification Church* v. *INS*, 547 F.Supp. 623 (D.D.C. 1982).

instruction was unnecessary, the court of appeals stated that *Holy Spirit Association* v. *Tax Commission*, *supra*, to the extent relied upon by the defendant, was "inapposite." *Id.* at 1227. That case, which held that the church's own definition of its religious beliefs was controlling, *is* directly relevant to the instant proceeding. The court in that case stated that:

> [I]t is for religious bodies themselves, rather than the courts or administrative agencies, to define, by their teachings and activities, what their religion is. The courts are obliged to accept such characterization of the activities of such bodies, including that of the Church in the case before us, unless it is found to be insincere or sham. 55 N.Y.2d at 527-28.

This principle should have been applied to this case as part of the American tradition of avoiding undue entanglement between the church and government. *See*, *Walz* v. *Tax Commission*, 397 U.S. 664 (1970); *Surinach* v. *Pesquera de Busquets*, 604 F.2d 73, 78 (1st Cir. 1978).

This prosecution must be viewed in the broad context of an increasing intrusion of the United States government into areas previously recognized as the sacred province of individual discretion and personal right. It is our belief that the government's actions in this case, as approved in the court of appeals decision, allowed the jury to impose its own lay standards as to whether the funds in question were properly treated as the Church's or as the personal property of Reverend Moon. The ultimate result of this intrusion is an overturn of church-state equilibrium by administrative fiat and an excessive government entanglement with religion in violation of the First Amendment.

II. INCOME ON FUNDS CONTRIBUTED BY CHURCH MEMBERS FOR THE BENEFIT OF THE CHURCH IS NOT TAXABLE AS INCOME TO A CHURCH OFFICIAL WHO HAD DOMINION AND CONTROL OVER SUCH FUNDS UNLESS THOSE FUNDS HAVE BEEN IMPROPERLY DIVERTED AND USED PRIMARILY FOR THE OFFICIAL'S OWN BENEFIT.

Amici agree with Petitioner Moon that the donors' intent should have been the critical factor in determining tax liability in this case. As pointed out by Petitioner, in considering the taxability of property placed in the hands of individuals for a charitable or similar purpose, federal courts have applied the following theory of tax liability:

> . . . while use of a portion of the property for the recipient's personal purposes may make *that portion* taxable as his income, the remainder—so long as held idle or used for the intended purpose—is not taxable to him. Nor is any of the interest earned on those idle funds taxable to him. (Petition for Certiorari at 23.)

Had this rule been applied in this case, interest earned on the funds donated for the benefit of the Unification Church would not have been taxable to Reverend Moon.

The court's instructions, which allowed the jury to ignore the crucial issue of donors' intent, constituted reversible error. But even if one assumes *arguendo* that the donors' intent was not the controlling factor in this case, the theory of tax liability applied by the lower court was incorrect. The trial judge's instructions to the jury and the court of appeals decision approving those instructions, ignore a basic principle of tax law which should have been applied if it is assumed that the reasoning adopted by the lower courts was applicable. This principle was enunciated by this Court more than forty years ago:

> The dominant purpose of the revenue laws is the taxation of income to those who earn or otherwise create the right to receive it *and enjoy the benefit of it when paid. Helvering* v. *Horst*, 311 U.S. 112 (1940). (Emphasis added.)

The Tax Court, applying the principle in the *Horst* case, has correctly recognized that the proper basis for taxation is not only the dominion and control of property *but the enjoyment of its economic benefit. Qualley* v. *Commissioner*, 35 T.C.M. 1976-208; *see also, Dawkins* v. *Commissioner*, 238 F.2d 1974 (8th Cir. 1956).[21] However, in this case, as Judge Oakes pointed out in his dissent, Reverend Moon was indicted and the case was tried on the theory simply that Reverend Moon had dominion and control of the assets, that he thus owned them and that he should have therefore reported *interest* income earned on the *corpus* of the funds. As noted in the majority opinion, Reverend Moon was not indicted, and the case was not tried, on the theory that he had diverted to his own use funds principally given to him for Church purposes, thereby incurring liability for failure to pay taxes on the *corpus* of the funds.

The government's theory that Reverend Moon "owned" the funds is clearly incompatible with the uncontradicted fact that the funds were given to Reverend Moon to be used for the benefit of the Church. Although the legal title to the assets was held by Reverend Moon, the equitable title remained with the Church as did the right to the beneficial use of the assets, a right which was legally enforceable. *Montana Catholic Missions* v. *Missoula County*, 200 U.S. 118 (1906). Consequently, the issue which should have been addressed by the court (again, that is, if one accepts the questionable proposition that the intent of the donors was not the controlling factor) was whether Reverend Moon used funds beneficially owned by the Church primarily for his own personal benefit, resulting in his "constructive" receipt of income. In order to treat the *interest* on the funds as income to Reverend Moon, the government should have been required to prove that the *funds* were "constructively" owned by Reverend Moon.

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[21] This Court has also recognized that although the very essence of taxable income is the accrual of some gain, profit or benefit to the taxpayer, not every benefit received by a taxpayer is necessarily taxable nor is the mere dominion over money or property decisive in all cases. *Commissioner* v. *Wilcox*, 327 U.S. 404 (1946); *see also Buder* v. *United States* 354 F.2d 941, 944 (8th Cir. 1966); *Brittingham* v. *Commissioner*, 57 T.C. 91, 100, 101 (1971) acq. 1971-2 C.B.2.

The court's failure to properly address the concept of personal benefit as a prerequisite to imposition of tax liability stems in part from the manner in which this case was prosecuted. The government's original indictment alleged only that Reverend Moon had "dominion and control" over the Chase accounts, and that the Tong Il stock was "issued" to Reverend Moon. By relying on the theory of dominion and control, the government apparently intended to prove that Reverend Moon had received "constructive" income, or in the case of stock, a "constructive" dividend.[2] However, under a theory of "constructive receipt," the government would have had to prove that the Reverend Moon exercised dominion and control over the funds and assets primarily for his own personal benefit, rather than for the benefit of the Church.

The government's superseding indictment did not, in response to the defendant's objection, allege that Reverend Moon "owned the assets beneficially." The new indictment simply charged that Reverend Moon "owned" the funds. Under this theory, interest earned on the funds would be taxable to Reverend Moon, regardless of whether Reverend Moon or the Church benefited from the use of the funds. This indictment effectively allowed the government to avoid the burden of proving either that Reverend Moon used the funds primarily for his own personal benefit, thereby constructively receiving income, or that Reverend Moon impropery diverted Church funds to his own use—two theories which clearly could not be supported by the record in this case.

Under the reasoning relied upon by the court of appeals, if funds are given to a recognized leader of a church by members who intend those funds to be a charitable contribution to the church—to be used for the benefit of the church—those funds may be treated as "personally" owned by that representative,

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[2] The government's reliance on the theory of "dominion and control" to impose tax liability, represented a tacit acknowledgement by the Government that it originally believed that the funds and assets were in fact legally and equitably the property of the Church. Thus, it was necessary to allege that the funds were "constructively" owned by the Reverend Moon in order to establish tax liability for interest income earned on those funds.

rather than "beneficially" owned by the church. The legal consequence of "personal" ownership, as that concept is applied by the court of appeals, is that criminal liablity may be imposed on the leader of a church for failure to report interest income earned on funds donated for the benefit of the Church. This would follow irrespective of the fact that: (a) the funds were used *primarily* for the benefit of the church; (b) there was no allegation that any funds were improperly diverted for the personal benefit of the church leader; (c) the leader of the church was *not* charged with failure to pay taxes on the *corpus* of the funds (under a theory of constructive receipt); and, (d) the church leader *did pay* taxes on those funds which were used for strictly personal purposes.

In the instant case, even if the court was correct in ignoring the primary factor of donors' intent—which it was not—the court's focus should have been directed to the issue of whether the funds and assets *admittedly* under the dominion and control of Revered Moon were used primarily for the benefit of the Church or primarily for the personal benefit of Reverend Moon. To impose criminal liability on Reverend Moon, the government should have been required to prove more than the fact that the funds and stock were "personally owned"[23] by, or "belonged to,"[24] Reverend Moon.

The court's failure to address the issue of personal benefit has resulted in a decision which is incorrect according to accepted principles of tax law. If allowed to stand, this decision will have far-reaching consequences when applied to traditionally accepted practices of many religious organizations in America today, or to any taxpayer in a position of custody or trust over funds.

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[23] The government's theory, according to the court of appeals was that "the funds he [Reverend Moon] held were his own personal property." 718 F.2d at 1229-1230.

[24] The instructions to the jury presented the issue as whether or not the funds and stock "belonged" to the Reverend Moon.

III. THE TEST APPLIED BY THE COURT DISCRIMINATES AGAINST RELIGION AND IMPOSES A STRICTER STANDARD OF TAX LIABILITY ON REVEREND MOON THAN THAT WHICH WOULD BE APPLIED TO A CONTROLLING SHAREHOLDER OF A CORPORATION

The circumstances under which the government has imposed tax liability on Reverend Moon are analogous to cases in which the government has attempted to impose tax liability on a controlling shareholder or officer of a corporation for expenditure of corporate funds, which the government has contended should be treated as constructive income or dividends for tax purposes. In these cases, in order to determine whether there is constructive income, the courts have consistently used a two-pronged test. First, the corporation must have conferred an economic benefit on the shareholder without expectation of repayment, *Loftin and Woodward, Inc.* v. *United States*, 577 F.2d 1206, 1214 (5th Cir. 1978); *Rapid Electric Co.* v. *Commissioner of Internal Revenue*, 61 T.C. 232, 239 (1973); *Dean* v. *Commissioner of Internal Revenue*, 57 T.C. 32, 40 (1971).[25] A second test must be met, however, because not every corporate expenditure which incidentally confers an economic benefit upon a shareholder may be characterized as a taxable constructive dividend, *Crosby* v. *United States*, 496 F.2d 1384 (5th Cir. 1974). Under this second test, income may be attributed to a shareholder only where a distribution is made *primarily* for the shareholder's personal benefit, as

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[25] In *Diedrich* v. *Commissioner of Internal Revenue*, 643 F.2d 499, 503-504 (8th Cir. 1981), *aff'd*, 102 S.Ct. 2414 (1982) the Court stated:

> It is a well-established principle of tax law that when a taxpayer constructively receives income, he is subject to income tax liability. It makes no difference whether he receives the benefit in the form of relief of encumbrance, or in the form of relief of tax liability; in either case, *the determinative factor is the receipt of the benefit.* (Emphasis added.)

See also, Sammons v. *Commissioner*, 472 F.2d 449, 453 (5th Cir. 1972) (". . . it is essential to the existence of a dividend, actual or constructive that the stockholder receives something from the corporation"); *Sachs* v. *Commissioner*, 277 F.2d 879, 883 (8th Cir. 1960) (". . . the courts, as arbiters of the true nature of corporate payments, have consistently used as a standard the measure of receipt of economic benefit as the proper occasion for taxation").

opposed to the advancement of the business interests of the corporation. *Ireland* v. *United States*, 621 F.2d 731, 735 (5th Cir. 1980); *United States* v. *Gotcher*, 401 F.2d 118 (5th Cir. 1968); *W. B. Rushing* v. *Commissioner of Internal Revenue*, 52 T.C. 888, 893 (1969). This requirement of personal benefit is not obviated by the fact that a corporation is controlled or dominated by one person. *Rapid Electric Co.* v. *Commissioner of Internal Revenue*, *supra*; *W. B. Rushing* v. *Commissioner of Internal Revenue*, *supra*.

The application of the theory of constructive receipt of income to the instant case can be most pointedly seen in the court's decision in *Nasser* v. *United States*, 257 F. Supp. 443 (N.D. Cal. 1966). There, the court addressed the issue of whether the transfer of corporate funds to the sole shareholder and president of a company constituted dividend income to him or whether the funds were transferred to him to be used on behalf of the corporation. The corporate funds in *Nasser* were transferred directly into the shareholder's personal savings and checking accounts. In deciding that the transferred funds were not constructive dividends, the court stated:

> ". . . although Nasser's dealings with the corporation were extremely informal and although at various times Nasser had apparent unrestricted control over the funds, . . . *at no point in all the transfers involved was the overriding corporate purpose aspect of the transactions sublimated to a personal or private usage.*"

Id. at 449. (Emphasis added.) In finding that the funds were not taxable to the shareholder, the court applied the economic benefit test and concluded that the transactions primarily benefited the corporation rather than the shareholder.[26]

In this case, to determine whether the Reverend Moon was criminally liable for failure to pay taxes, the trial judge instructed the jury that the key issue was ". . . whether or not the bank accounts at the Chase Manhattan Bank and the Tong Il stock issued in Reverend Moon's name *belonged* to Reverend

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[26] *See also*, *Alisa* v. *Commissioner of Internal Revenue*, ¶ 76,255 P-H Memo T.C. (1976).

Moon." (Emphasis added.) Among eight factors which the jury was instructed to consider in determining ownership, the court made no reference to the concept of "personal benefit." This concept was addressed only incidentally at the end of the list, when the jury was instructed to consider the "manner in which the stock and funds were administered."

The court of appeals stated that evidence was introduced by the government that Reverend Moon ". . . used funds from the account for expenditures *which the jury could have concluded* were personal in nature" and that he ". . . used the accounts in a *seemingly personal* manner. . . ." (Emphasis added.) To prove constructive receipt of the funds in a corporate context, the government would have been required to prove not that a portion of the funds were on occasion used in a "seemingly personal" manner, but that the funds were, from the Church's point of view, used *primarly* for Reverend Moon's own personal benefit rather than for the benefit of the Church.

The distinction between a standard which requires a "primarily personal" benefit test and one which requires a "seemingly personal" benefit test is as critical in this case as it is in the corporate context. As pointed out in Judge Oakes' dissent, the religious context gives this case a special color:

> . . . the taxpayer here was the founder and leader of a worldwide movement which, regardless of what the observer may think of its views or even its motives, is nevertheless on its face a religious one, the members of which regard the taxpayer as the embodiment of their faith. Because Reverend Moon was the spiritual leader of the church, the issue whether he or the church benefically owned funds in his name was not as crystal-clear as might seem at first glance to be the case. *United States* v. *Moon*, 718 F.2d at 1242.

Any suggestion of personal benefit becomes particularly attenuated, when, as acknowledged by the trial judge, a religious organization can properly pay the living expenses of its leaders to allow them to pursue religious purposes, or may

even make loans to its ministers on arm's length terms.[27] In such a context, it was essential that the jury be given clear guidelines to determine whether the primary purpose of the transactions was to benefit the Church or Reverend Moon. The trial judge, however, failed to instruct the jury specifically on this point and generally on the concept of personal benefit.

The instructions under which Reverend Moon was convicted treated him far more harshly than a controlling shareholder or officer of a secular corporation would have been treated. In this way the instructions inevitably discriminated against all of those religious bodies which, like the Unification Church and the Roman Catholic Church, have systems of property ownership conferring dominion and control upon church leaders. The resulting precedent is bound to be far-reaching and deleterious to churches everywhere in the United States. This is in clear violation of the anti-establishment tenets of the Constitution.

CONCLUSION

The violation of basic principles of tax law and even more fundamental considerations of constitutional law in this case are of the deepest concern to the *amici*. *Amici* urge that the Court grant certiorari in this matter and use this case to delineate clearly and sharply the principles which government may not violate, either to erode the integrity of *bona fide* religions or to subvert constitutional safeguards designed to protect both accepted and unorthodox faiths.

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[27] *See Morey* v. *Riddell*, 205 F.Supp. 918, 921 (S.D. Cal. 1962). In dismissing the argument that contributions made by members of a Church were not deductible because they were used in part for the benefit of the ministers, who received the funds as agents of the Church, the court stated:

> The individuals benefitted were the church's recognized ministers, who employed a portion of the contributions given for the use of the church to pay their living expenses. Such use of the contributions does not constitute a departure from the statutory requirement that no part of the net profits of the organization shall inure to the benefit of any individual, for the sums expended to meet the living expenses of the ministers were no part of the net profits of the church. They were monies expended to meet legitimate expenses of the church in implementing its religious purposes.

Respectfully submitted,

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March 25, 1984

APPENDIX

APPENDIX A

UNITED STATES SENATE
Washington, D.C. 20510

January 9, 1976

Mr. Donald Alexander
Commissioner
Internal Revenue Service
1111 Constitution Avenue
Washington, D.C. 20224

Dear Mr. Alexander:

A large number of my constituents have contacted me about the Unification Church headed by Mr. Sun Myung Moon. Their questions and statements raise doubt in my mind about the tax exempt status of that organization.

A few constituents writing me have sons or daughters that have been or are members of the Unification Church. Their letters are enclosed for your information. Most of those contacting me have read articles by investigative reporters and copies of those articles are attached.

As I understand, the first test for a tax exemption on religious grounds is that the group must be organized and operated exclusively for religious purposes. The information provided suggests the Unification Church may not meet this test in three ways.

Most of those contacting me question whether the organization is based on a bona fide religion or on mind control techniques. Parents of members and former members state that while initial entry into the group is clearly voluntary, the subsequent actions of members suggest the loss of any ability to make any reasoned or unguided choice about continued participation in the group. This may indicate that the organization is maintained not by religious motivation, but by the calculated eradication or erosion of each member's ability to make an

alternate choice. The well-documented process of training and initiation activities appears to substantiate that the organization is based more on mind control and indoctrination than on religious faith.

Many Kansans have advised me that a major purpose of the organization is the accumulation of wealth and power and not the practice or furtherance of a religion. Former members indicate that the primary emphasis of leadership within the organization is the collection of money through the sale of various items. Members of the organization are subjected to great pressure to obtain funds, suggesting that the exclusive purpose of the organization is not a religious one, but that in fact a major goal is the accumulation of wealth.

Some statements by Mr. Moon and activities by some of his followers indicate a substantial political purpose, contrary to the requirement that the group be organized and operated exclusively for religious purposes. As described by the enclosed materials, Mr. Moon has made several statements implying political and governmental objectives. Since many members of the group apparently perceive Mr. Moon to be the embodiment of the Church, the appearance is that his stated intentions are not simply the goals of a private individual but the stated purposes of the organization. The contacts of many followers with members of Congress suggest that the organization is being operated not exclusively for religious purposes but at least to some extent for political purposes.

A second test for a tax exempt religious organization, as I understand, is that no part of its net earnings inures to the benefit of any private individual. The attached articles by investigative reporters indicate that the head of the group, Mr. Moon, leads a far more affluent life than could reasonably be expected for any clergyman. This fact, if substantiated, suggests that a substantial portion of the group's net earnings, including the sizeable wealth collected by its members, may accrue to the private holdings and benefit of Mr. Moon. Based on the reports, Mr. Moon may hold properties in this country and others.

Based on the facts reported by my constituents and by articles in the public media, it appears that the tax exempt status of the Unification Church is questionable. It is my feeling, on this basis, that an audit of the organization may be warranted.

Your response would be greatly appreciated.

Sincerely yours,

/s/

BOB DOLE
United States Senator

BD:cav
Enclosures